



POLICE DEPARTMENT

In the Matter of the Disciplinary Proceedings :
- against - : FINAL
Police Officer Anthony Battisti : ORDER
Tax Registry No. 900179 : OF
Military and Extended Leave Desk : DISMISSAL

Police Officer Anthony Battisti, Tax Registry No. 900179, Social Security No. ending in [REDACTED] having been served with written notice, has been tried on written Charges and Specifications numbered 2009-0405 as set forth on form P.D. 468-121, dated February 4, 2009 and after a review of the entire record, Respondent has been found Guilty of Specification Nos. 2, 4, 5, and 7. Respondent having Pleaded Guilty to Specification Nos. 1 and 6 is found Guilty.

Now therefore, pursuant to the powers vested in me by Section 14-115 of the Administrative Code of the City of New York, I hereby DISMISS Police Officer Anthony Battisti from the Police Service of the City of New York.

A handwritten signature in black ink, appearing to read "Raymond W. Kelly".

RAYMOND W. KELLY
POLICE COMMISSIONER

EFFECTIVE: On March 12, 2012 @0001HRS.



POLICE DEPARTMENT

February 14, 2012

In the Matter of the Charges and Specifications : Case No. 2009 - 0405

- against -

Police Officer Anthony Battisti :

Tax Registry No. 900179 :

Military and Extended Leave Desk :

At: Police Headquarters
 One Police Plaza
 New York, New York 10038

Before: Honorable David S. Weisel
 Assistant Deputy Commissioner - Trials

A P P E A R A N C E:

For the Department: Daniel Maurer, Esq.
 Department Advocate's Office
 One Police Plaza
 New York, New York 10038

For the Respondent: Charles H. Horn, Esq.
 Friedman Harfenist Kraut & Perlstein LLP
 3000 Marcus Avenue – Suite 2E1
 New York, New York 11042

To:

HONORABLE RAYMOND W. KELLY
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NEW YORK 10038

The above-named member of the Department appeared before the Court on November 14, 15, and 16, 2011, charged with the following:

1. Said Police Officer Anthony Battisti, assigned to the 103 Precinct, on or about and between July 6, 2007 and January 23, 2009, in Nassau County, did knowingly associate with a person reasonably believed to be engaged in, likely to engage in or to have engaged in criminal activities, in that Police Officer Battisti visited Timothy Gersbeck while Timothy Gersbeck was incarcerated at the Nassau County Correctional Facility, at a later date met with Timothy Gersbeck after he was released from incarceration, and had repeated telephone conversations with Timothy Gersbeck. *(As amended)*

P.G. 203-10, Page 1, Paragraph 5 PROHIBITED CONDUCT

2. Said Police Officer Anthony Battisti, assigned to Fleet Services Division, on or about January 23, 2009, while assigned to the 103 Precinct, with the intent to cause the death of another person, in the County of Nassau, State of New York, attempted to cause the death of Person A by entering into an agreement with Timothy Gersbeck whereby Timothy Gersbeck would cause the death of Person A in exchange for a sum of United States currency provided by Police Officer Battisti. *(As amended)*

P.G. 203-10, Page 1, Paragraph 5 PROHIBITED CONDUCT

NYS PENAL LAW 110/125.27 (1)(a)(vi) ~ ATTEMPTED MURDER IN THE FIRST DEGREE

3. Said Police Officer Anthony Battisti, assigned to Fleet Services Division, on or about January 23, 2009, while assigned to the 103 Precinct, with the intent that conduct constituting a Class A felony be performed, in the County of Nassau, State of New York, Police Officer Battisti entered into an agreement with Timothy Gersbeck to murder Person A and provided a weapon and information about Person A to Timothy Gersbeck to be used in the commission of the murder. *(As amended)*

P.G. 203-10, Page 1, Paragraph 5 PROHIBITED CONDUCT

NYS PENAL LAW 105.15 CONSPIRACY IN THE SECOND DEGREE

4. Said Police Officer Anthony Battisti, assigned to Fleet Services Division, on or about January 23, 2009, while assigned to the 103 Precinct, while acting in concert with and or aiding and abetting and being aided and abetted by Timothy Gersbeck, in the County of Nassau, State of New York, with the intent to cause physical injury to another person, caused such injury to Person A by stabbing her in the neck with a sharp metal object. *(As amended)*

P.G. 203-10, Page 1, Paragraph 5 – PROHIBITED CONDUCT

NYS PENAL LAW 120.05 (2) – ASSAULT IN THE SECOND DEGREE

5. Said Police Officer Anthony Battisti, assigned to Fleet Services Division, on or about January 23, 2009, while assigned to the 103 Precinct, while acting in concert with and or aiding and abetting and being aided and abetted by Timothy Gersbeck, in the County of Nassau, State of New York, possessed a sharp metal object with intent to use it unlawfully against Person A. *(As amended)*

P.G. 203-10, Page 1, Paragraph 5 PROHIBITED CONDUCT
NYS PENAL LAW 265.01 (2) – CRIMINAL POSSESSION OF A WEAPON
IN THE FOURTH DEGREE

6. Said Police Officer Anthony Battisti, assigned to Fleet Services Division, on or about January 24, 2009, while assigned to the 103 Precinct, was wrongfully in possession of a duplicate NYPD shield, number 11233. *(As amended)*

P.G. 203-10, Page 1, Paragraph 5 – PROHIBITED CONDUCT

7. Said Police Officer Anthony Battisti, assigned to Fleet Services Division, on or about July 3, 2009, was wrongfully in possession of a Department radio previously reported missing from the 103rd Precinct in 2006. *(As amended)*

P.G. 203-10, Page 1, Paragraph 5 PROHIBITED CONDUCT

The Department was represented by Daniel Maurer, Esq., Department Advocate's Office.

Respondent was represented by Charles H. Horn, Esq., Friedman Harfenist Kraut & Perlstein LLP.

Respondent, through counsel, entered a plea of Not Guilty to Specification Nos. 2-5 and 7. He pleaded Guilty to Specification Nos. 1 and 6 and testified in mitigation of the penalty. A stenographic transcript of the trial-mitigation record has been prepared and is available for the Police Commissioner's review.

DECISION

Respondent is found Guilty of Specification Nos. 2, 4, 5 and 7. Having pleaded Guilty to Specification Nos. 1 and 6, he is found Guilty. He is found Not Guilty of Specification No. 3.

SUMMARY OF EVIDENCE PRESENTEDThe Department's Case

The Department called Person A, Brian Dashner, Damian Perez, Timothy Gersbeck, and John McNelis as witnesses.

Person A

Person A was presently a resident of [REDACTED] (which includes the [REDACTED] area). She was married to Respondent from 1995 until 2005. They had two children in common, Minor B and Minor C. At the time of the incident in question, Minor B was 14 years old and Minor C about 12. She also had two other children, Damian Perez, and a daughter, [REDACTED]

Prior to getting married, Person A testified, she and Respondent were happy. After getting married, however, things began to change. Respondent began receiving phone calls and text messages from other women. He would get very angry when she found out. Respondent would punch the walls and on one occasion, he wrapped a vacuum cord around Person A's neck. Respondent then told Person A that "if I ever messed with his job he would kill me and he knows how to get away with it."

Respondent and Person A went through a divorce. They were involved in a custody dispute over Minor B, of whom Respondent sought custody. According to Person A, Respondent never sought custody of Minor C. Although Minor B expressed a desire to live with Respondent, Person A was granted custody.

Person A testified that in January 2009, she resided at [REDACTED] [REDACTED]. She was a member of the [REDACTED] gym on [REDACTED] in

[REDACTED] At the time, she was employed by the Nassau County Department of Social Services. She drove a [REDACTED] (see Department's Exhibit [DX] 4, photograph of front entrance of Person A's house, showing vehicle).

Person A testified that on Friday, January 23, 2009, prior to 1830 hours, she went to work then went shopping afterward. Minor B and Minor C had visitation with Respondent. She came home, where Perez and her boyfriend, Brian Dashner (fiancé at the time of trial), were waiting. She parked her car in the driveway and began walking toward her front door while carrying packages in both hands. She opened the screen door, and as she began unlocking the front door, someone covered her mouth with his left hand. With his right hand the man held something "cold and sharp" against the back of her neck, and said, "[I]f you tell anyone I'll kill your son and daughter."

At first, Person A was "thinking I am not believing this," so she turned her head around. She saw a man wearing a hoodie and some kind of light-colored mask or scarf over his face. She realized the man was serious and she turned back around. The man stabbed her in the back of her neck with the sharp object. Person A fell against the front door, the door opened, and she landed on the floor, halfway inside her house and halfway on the stoop. She then saw the suspect running away and Dashner chasing after. While on the floor, she saw the clothes the suspect had on as he was running away.

DX 1 was a photograph of the clothing that the suspect, later identified as Timothy Gersbeck, was wearing. Person A had never seen Gersbeck before.

Person A knew she was stabbed in the back of the neck and was bleeding, but she did not see any blood on her hands. She called 911 and reported the attack (see DX 2, 911 recordings of

Respondent's and Perez's calls; DX 2a & 2b, respective transcripts). DX 5 was a photograph of the inside of the house, depicting the front door.

Person A gave statements regarding the attack to the Nassau County Police Department (NCPD) (see DX 3a-c, Person A's written statements). These were synopses of the event, dictated by her but taken down by a police officer.

Person A testified that she suffered a headache and pain in her neck radiating to the top of her head as a result of the attack.

On cross examination, Person A stated that she did not know whether Minor C had told Respondent that she wanted to live with her mother. Person A denied that Minor B's law guardian recommended that Respondent receive custody of the boy. She asserted that the law guardian's job was to do what the client wanted.

Person A insisted that it was the force of the sharp object going into her neck that made her fall forward. It was because the attacker pushed her so hard that she thought she must have been profusely bleeding, although she was not. She did not receive stitches but was given a tetanus shot. She was taken to [REDACTED]

Person A denied yelling, as she was being placed into the ambulance, that "it was Anthony, that son of a bitch Anthony did this." She testified that she was yelling about "this son of a bitch Gersbeck. I wanted to jump the fuck out of that ambulance and get Gersbeck for threatening my kids."

Brian Dashner

Dashner, a resident of [REDACTED], was Person A's fiancé. They were dating at the time of the incident. Dashner had been employed as sales director of a gaming company that

went out of business. At the time of the incident, Dashner was visiting his family in [REDACTED] and decided to stay with Person A until he went back to [REDACTED]

Dashner admitted that that he had a history with the criminal justice system. DX 6 was a synopsis of that history. It listed dates, offenses and dispositions.

Dashner testified that on January 23, 2009, he was watching television at Person A's residence. He noticed the door fly open and saw Person A fall to the ground. He "assumed" she might have been punched. Directly behind her, he saw Gersbeck with a mask on his face. He described Gersbeck wearing the same clothing as depicted in DX 1. In addition, Dashner testified, Gersbeck was wearing blue latex gloves.

After Person A fell inside the house, Gersbeck, after realizing that Dashner was inside the house, ran off. Dashner then gave chase and subsequently apprehended Gersbeck with the help of Perez. While Dashner held Gersbeck in a chokehold, Perez began to question him and Gersbeck reluctantly responded by yelling, "I was hired" and "go help the girl, go back and protect the girl." When Dashner pressed Gersbeck as to who had hired him, he admitted that it was Respondent.

Dashner said that while he was chasing Gersbeck, he saw Gersbeck holding a "yellow like" object. He also saw Gersbeck throw his blue latex gloves behind a fence. DX 7 was a photograph of the location where Dashner apprehended Gersbeck and DX 8 was a photograph of the fence where Gersbeck threw his blue latex gloves.

The NCPD arrived and separated the three men, placing them into separate police vehicles. It was while Dashner was in the back seat of the police vehicle that he learned Person A had been stabbed. Police officers took Dashner's oral statement regarding the incident. DX 9 was Dashner's written statement he made to the NCPD.

On cross examination, Dashner acknowledged that he had been arrested several times in many states. In 1994, he pleaded guilty to unlawful possession of a weapon for possessing a handgun. In 1996, he pleaded guilty to stalking. He blamed the incident on an erstwhile girlfriend's overreacting stepfather. The 2003 Connecticut breach of the peace incident involved an "argument at a bar fight," but there were no punches thrown. Two months later, he pleaded guilty to assault and battery in Virginia. He saw an individual, unbeknownst to him a police officer, grab someone. The 2004 Florida disturbing the peace and trespass incident arose when his friends took him to a casino for his birthday and he had an argument with security. He also had convictions for possession of marijuana and nitrous oxide.

Dashner testified that both Respondent and Person A were volunteers for the Franklin Square & Munson Fire Department (FSMFD). Dashner denied telling a FSMFD chief, when he got back to the house, that "your boy's going down." Dashner testified that a friend of Person A asked him if it was true that Respondent was involved. Dashner answered that he did not know but that was what Gersbeck alleged. The chief, overhearing, said, "[T]hat's F'ing bullshit." Dashner told the chief, whom he assumed was a friend of Respondent, that because the fire department's response had been completed, he had no further business at the residence and should "get back in his truck and get out of here."

Dashner acknowledged that had Gersbeck said anything while he was being held down, Perez would have heard it because he was not that far away.

On re-direct examination, Dashner testified that his weapon possession conviction was for a BB gun. He had possessed nitrous oxide for automotive speed purposes, not inhalation.

Damian Perez

Perez testified that Person A was his mother. Respondent, his stepfather, was like a father figure to him. He lived with his mother at the time of the incident. Perez testified that when Person A and Respondent were getting divorced, there was a lot of fighting over custody and visitation.

On the day of the incident, Perez was at home when he heard a loud thud by the door. The door swung open and Perez observed that Person A was on the floor. Gersbeck was behind her wielding a "shiny metallic object" and wearing blue latex gloves. Gersbeck turned around and ran; Dashner and Perez ran after him. Dashner was running ahead of Perez.

Perez and Dashner finally subdued Gersbeck. While doing so, Gersbeck told another passerby that Perez and Dashner were mugging him. The bystander said that he was calling the police. Perez called 911 too. Perez testified that he was standing a few feet away from Dashner when he made the call. After the 911 call, Dashner told Perez that "Tony was the one who sent him." Perez provided the NCPD with a written statement (see DX 10).

On cross examination, Perez admitted that even though Gersbeck told Dashner that Respondent had sent him, Perez did not mention Respondent's name while giving his official statement to the police. He agreed that at one point, while in high school, his mother kicked him out of the house and he had to live at his friend's house.

Timothy Gersbeck

Gersbeck was presently incarcerated at Franklin Correctional Facility (a medium-security state prison). He was serving a sentence of eight years for the attempted murder of Person A. Gersbeck testified that on January 23, 2009, he was trying to murder her.

Gersbeck acknowledged that he had a history with the criminal justice system (see DX 11, synopsis of offenses and dispositions).

Gersbeck met Respondent in 2002 when they worked at a trash-carting and waste management company together. Respondent and Gersbeck also socialized at a race track where they raced stock cars. When Respondent got his first race car, Gersbeck performed almost all of the construction and body work on it. He sometimes worked on the vehicle at Respondent's mother's residence and at other times at a building owned by their employer.

Gersbeck testified said that "in the beginning," Respondent did not speak much about Person A. After a while, however, Respondent began having a "hostile, negative attitude" toward her. After the divorce, Respondent told Gersbeck that he wanted to kill his ex-wife. Gersbeck did not believe him.

On July 6, 2007, Gersbeck was in jail for larceny and unemployment fraud. Respondent visited Gersbeck there several times. Most of the time they talked about racing, but on the second visit Respondent brought up the topic of killing Person A. Gersbeck still "didn't really believe it fully but it was getting there."

After his release from jail, Gersbeck went back to racing cars with Respondent. As their friendship progressed, Respondent again spoke about killing Person A because she kept taking him to court and the child support payments were increasing. Gersbeck noticed that Respondent had become quite serious about killing her.

Finally, Respondent asked Gersbeck to kill Person A. At first, Respondent did not offer to pay Gersbeck but in April 2008, Respondent offered to pay a total of \$5,000. That month, while at the home of Respondent's mother, Respondent gave the first payment of \$2,500 to Gersbeck. Gersbeck accepted this and agreed to kill Person A.

In August 2008, while Gersbeck was at the residence of Respondent's mother, Respondent gave him a sharpened screwdriver and told him to use it "to do the job" on Person A. Respondent instructed him to stab her in the back of the neck right below the bottom of the skull. The suggestion came from the movie *Goodfellas*, where the same thing was done. Gersbeck testified that he and Respondent used code when communicating about the murder. For example, "at the shop" meant that Person A was home.

Gersbeck testified that he did not know what Person A looked like. In December 2008, however, he first saw her at a gas station near her house. Gersbeck recognized her car there and followed her home. Gersbeck parked his car near her house and waited, but then he saw Person A run across the street to an ambulance. Respondent responded to the call as well and told Gersbeck to meet him at the firehouse. Respondent was in a "casual" mood that night, having just come from the rescue call and gave Gersbeck a second payment of \$300. Gersbeck told him he wanted to do the murder that night but could not because the ambulance was across the street.

Gersbeck testified that although Respondent owed him \$5,200 for a motor that Gersbeck bought for him earlier in the year, the two installments that Respondent made to Gersbeck were not as repayment for the motor but for the murder of Person A. Gersbeck's understanding was that the balance of the payment would come after Person A was killed.

After the second installment, Respondent recommended several ways and locations in which to carry out the murder. For instance, Respondent told Gersbeck that he could beat her to death, shoot her with Respondent's shotgun, or use a sharpened screwdriver. Respondent suggested killing her at the gym she attended, or at her residence. Respondent noted that the gym's parking lot was in the back and was neither well lit nor "a very visible place." Respondent also told Gersbeck that Person A drove a [REDACTED] convertible coupe and

provided him with a side-streets route she used to get home from work. He pointed out the building where she worked. Respondent suggested killing her at night or in rainy conditions.

During the months preceding the incident, Gersbeck drove past Person A's residence and her gym at least a dozen times.

On January 16, 2009, Respondent again invited Gersbeck to the firehouse and asked him when he would kill Person A. Later on the same day, Respondent called Gersbeck, who met Respondent at the home of Respondent's mother. There, he again asked Gersbeck when he would do the murder. This time, Respondent was agitated and told Gersbeck that "if I didn't get the job done something would happen to my wife and kids." Respondent showed Gersbeck a video of Gersbeck's wife driving his daughter to school. Gersbeck then tried returning the \$2,800 to Respondent but Respondent refused and told Gersbeck to finish the job.

On January 23, 2009, Gersbeck spoke with Respondent on two separate occasions. During their first conversation, Respondent said he was taking the children to his girlfriend's house upstate so that Person A would be by herself. During the second conversation, Respondent told Gersbeck that they would not actually be leaving until 1800 or 1900 hours and that he should carry out the attack shortly thereafter. Gersbeck asked for gas money. Respondent said that he would leave the money either by the car trailer at the home of Respondent's mother, or near some paving stones known as Belgian blocks. Gersbeck claimed that he never retrieved the money.

DX 14 was a photograph of the residence of Respondent's mother. DX 15 was a photograph of the race car and trailer. DX 16 was a photograph of the residence's garage. DX 17 was a closeup photograph of a flowerbed and paving stones.

Gersbeck arrived at Person A's residence at approximately 1730 or 1800 hours carrying the sharpened screwdriver and wearing the outfit depicted in DX 1. DX 13 was a photograph depicting a sharpened screwdriver wrapped in a white latex glove.

On January 23, 2009, Gersbeck drove by Person A's residence and waited a block away for her to arrive. When Person A pulled into her driveway, Gersbeck got out of his car and hid behind a neighbor's vehicle. As Person A walked up her front porch, Gersbeck ran across the lawn and "hit her in the back as she was opening the door and knocked her down through the door and I just took off running." Gersbeck was carrying the sharpened screwdriver in his right hand as he ran.

Gersbeck asserted that he was "just going to stab her in the back of her neck," but accidentally hit her with his legs and pushed her through the front door as she was unlocking it.

When Gersbeck pushed Person A through the front door, he did not notice anyone inside the house. Gersbeck did not see anyone chasing him as he was running away. He said he threw the screwdriver over the fence and onto the field next to the firehouse. He also took off his blue latex gloves and threw them behind the fence (see DX 12, photograph of blue latex gloves).

After running off, Gersbeck was stopped by Perez and Dashner. Gersbeck said he did not make any statements to Perez or Dashner. The police brought Gersbeck to Person A's residence where Person A identified Gersbeck as the assailant. Gersbeck gave a statement to the NCPD (see DX 19, Miranda warnings; DX 18, Gersbeck's written statement).

After Gersbeck was arrested, he provided the Nassau County District Attorney's Office (DA) with a video statement. DX 20 was a recording of the video statement. In his video statement, Gersbeck conceded, he said that he never removed the screwdriver from his pocket as

he attacked Person A. He testified that he made this false statement because he was nervous and scared.

While Gersbeck was incarcerated he wrote a letter to his girlfriend Person D (also known as [REDACTED]) (see DX 22, letter). In the letter to Person D, received by her on February 24, 2009, and also in subsequent conversations with other members of his family, Gersbeck downplayed his role in the incident because he did not want Person D and his family members to think he was capable of murdering someone. He said that the money given to him by Respondent was really for the race car's motor because he did not want Person D to think that he was involved in a murder for hire.

Gersbeck entered into a written plea agreement with the DA's Office (see DX 21, plea agreement). The agreement required him to plead guilty to Attempted Murder in the Second Degree in satisfaction of the indictment charging Attempted Murder in the First Degree, in exchange for a sentence of eight years in prison. The agreement also required him to testify truthfully concerning the incident to all questions asked of him in any court proceeding. He remained subject to prosecution for perjury and obstruction of justice.

On cross examination, when asked if he described his relationship with Respondent as "friends," Gersbeck replied, "Casual." When asked, "You were friends?," Gersbeck answered, "We didn't go out or anything drink or anything." They only worked on cars together, but did have pizza one time, and they did talk on the phone a lot. He finally admitted that they were in fact friends.

Gersbeck confirmed that he knew the location of Person A's home before seeing her that first time at the gas station.

Gersbeck denied that when he received the \$300 from Respondent just before Christmas, he also received a Christmas tree from the FSMFD or Respondent. He denied telling Respondent at that time that he was not working and was desperate for money for Christmas gifts, and that in return, Respondent gave him \$300 and a tree. Gersbeck denied that he was on the fire department's softball team or knowing that all FSMFD members received free Synergy memberships. He was never a FSMFD volunteer. Gersbeck's father was a volunteer firefighter, however; both he and Respondent had access to white latex gloves.

Gersbeck testified that in January 2009, when he and Respondent met at the firehouse, they spoke about killing Person A in the truck bays, then entered the house to talk about racing in the firehouse's barroom. He acknowledged telling the assistant district attorney (ADA), Anna Acquafredda, in his video statement that there were surveillance cameras there. He denied changing his account at trial so as to have the first conversation take place in the bays because he discovered that the surveillance depicted witnesses in the barroom.

Gersbeck denied wanting to rob Person A and insisted that he wanted to kill her. Gersbeck denied that he was desperate for money as a result of being behind in child support payments, but admitted saying this in his written NCPD statement. Gersbeck denied that he asked a friend, Person E, for a loan, although he admitted during Respondent's criminal trial that he did so. Person E owned a cement company and Gersbeck contacted him looking for work. Although Gersbeck denied that the DA's Office specifically said that they "wanted Anthony Battisti," Gersbeck agreed that he told Person E this.

Gersbeck agreed that the NCPD detective dictated his written statement. Gersbeck went through seven or eight drafts before signing it. The video statement was taken around 0530 hours the next morning.

One of the early meetings with the DA's Office, after the video statement, did not go well. The ADA was raising his voice at Gersbeck so Gersbeck raised his voice back. At a court proceeding, Gersbeck stated that the ADA had been "a dick" during the meeting. A subsequent meeting with the DA's Office went much better.

In his written statement to the NCPD, Gersbeck stated that the reason he had to kill Person A was that Respondent had "leverage" over him because Respondent had fixed some of his traffic tickets. Gersbeck made no mention of any threat to his family. Moreover, in his video statement to Acquafredda, Gersbeck again failed to mention the threats.

Gersbeck testified at trial that Respondent, while visiting him in jail, threatened to have him kept in jail longer due to the tickets if he did not carry out the murder. Gersbeck noted, "I have a very stupid criminal past and stupid things on my record so I didn't put anything past anybody." Some of the summonses were for aggravated unlicensed operation of a vehicle. Nevertheless, at the time Respondent began threatening him, Gersbeck did not yet think Respondent was serious about killing Person A.

Gersbeck testified that Respondent, in addition to threatening Gersbeck's family, also pointed his firearm at him. He first made this statement while testifying before the grand jury. Gersbeck also made previous statements that Respondent had his hand on his gun while showing him the video of his family. Gersbeck did not include this in his statement to the police.

Gersbeck agreed that he made a previous statement that "Tony told me that he'd done so much for me." Gersbeck insisted that this was a threat, not that Respondent was trying to guilt him into committing the murder.

Gersbeck stated that Respondent neither showed him a picture of Person A nor did he ever point her out to him. Gersbeck agreed that he did not know what Person A actually looked like.

Gersbeck testified that Respondent instructed him that a cell phone could be traced if the battery was in it. Thus, Gersbeck took out the battery on the night of the attack, but thought he did so before parking his car near Person A's residence.

Respondent's Exhibit [RX] A1-10 were various photographs of Gersbeck's vehicle. RX A4 and A5 depict white latex gloves in the front console and trunk of Gersbeck's vehicle. Gersbeck stated that he and Respondent used the gloves while they were working on the cars. He stated that Respondent gave him the gloves to use in committing the murder.

Gersbeck testified that he took a four-to-five foot leap while running up Person A's walkway before striking her. He denied placing the screwdriver to the back of her head and telling her, "[D]on't tell anyone or I'll kill your son and daughter."

Gersbeck asserted that after he leapt up the stairs and knocked Person A down, he realized that what he was doing was wrong, so he turned around and ran off. He saw people inside the home, but he denied breaking off a robbery attempt of Person A because he saw those people.

In Gersbeck's February 24, 2009, letter to Person D (DX 22), Gersbeck wrote, "I sold him one of my race motors and he still owes me \$5200⁰⁰ bucks. So now that I[']m working with the system they said that money is money for hire the way it went down but he actually owes me more th[a]n that and I[']m still out of the money and the motor."

On re-direct examination, Gersbeck explained that he told Acquafredda on the video that he did not intend to kill Person A because "[i]t was a long day I was nervous and scared about everything that was going on."

Gersbeck stated that he did not use white latex gloves while working with cement.

Gersbeck agreed that in the letter to Person D, he wrote that Respondent had pulled his firearm on him twice.

John McNelis

McNelis, a physician, was vice chairman of surgery and director of trauma and surgical critical care at [REDACTED] Hospital. The Court deemed McNelis an expert for the instant case in the field of “[g]eneral surgery trauma.”

In response to an emergency room trauma alert, McNelis came to treat Person A on January 23, 2009. DX 23 was Person A’s file from V [REDACTED]. McNelis explained that a trauma alert was an indicator of injury significant enough to warrant immediate attention. Upon examination, McNelis observed a very sharp puncture wound at the posterior of Patricia’s neck, specifically where the posterior of the neck met the base of the skull. The anatomical structures of concern in that area were the spinal cord and the midbrain, which controlled the respiratory center. There were also major arteries, several vein structures, cranial nerves, the esophagus and airway in that area of the body.

Upon review of the photograph of the screwdriver (DX 13), McNelis stated that Person A’s injury “might be” consistent with having been made by the screwdriver. He explained that had the weapon hit one of the major vessels or an area of the brain, it could have resulted in paralysis or instantaneous death. A hit to the esophagus could have caused sepsis, and a hit through the airway could have caused respiratory distress. Bleeding to death or a brain hemorrhage were also possibilities, depending on the angle of penetration.

To rule out major injuries to the vessels or anatomic structures, McNelis had a computer tomography (CT) scan conducted on Person A’s head and neck area.

Person A had pain at the site of the injury. She rated the pain as an eight on a scale from one to ten, and she complained of a headache the next day. The emergency department physician described the injury as a superficial laceration 0.5 cm in diameter. To McNelis’

recollection, the injury was smaller in diameter than 0.5 cm, but the measurement was consistent with a puncture.

DX 24a was a diagram of the major blood vessels in the neck. DX 24b and 24c were photographs of a mannequin with the insides of the neck exposed.

On cross examination, McNelis confirmed that no matter how deep the wound was, it had to be taken seriously given its location. He did not recall stitches being required. Although the history section of the CT report stated that the wound was made in an upward trajectory, McNelis explained that trajectory was not something the CT scan would have determined. He could not say whether that statement was based on the patient's recitation.

McNelis confirmed that Person A's rating of her pain was subjective. Neither major medication nor surgical intervention was required. Person A was given [REDACTED] for her headache. In addition, she was administered [REDACTED] for [REDACTED] [REDACTED] medication. The [REDACTED] probably was ordered by the staff as [REDACTED] against a [REDACTED] because the patient was not eating. McNelis believed it probably was unnecessary. [REDACTED] was ordered for Person A but never actually received by her.

The medical records indicate that there was no bleeding at any time through the wound while Patricia was in the hospital. McNelis characterized the injury as a puncture wound that was neither very deep nor life-threatening. While the neck area was a dangerous place to be stabbed, no major vessels or organs were struck in Person A's case.

Upon questioning by the Court, McNelis testified that in his opinion, "superficial" meant a wound that did not penetrate past the subcutaneous fat layer. Person A's wound was never probed to see how deep it was because that was not medically necessary.

On re-cross examination, McNelis testified that there were no major blood vessels in the subcutaneous fat layer. He did not think Person A's wound penetrated much deeper than that layer.

Respondent's Case

Respondent testified on his own behalf.

Respondent

With regard to Specification No. 6, Respondent explained that he purchased a duplicate shield as a back-up to his original shield. The back of his Department-issued shield broke off and he could not attach it to his uniform, so he wore the duplicate shield while on duty. He acknowledged that possession of a duplicate shield was against Department regulations.

Respondent testified that he visited Gersbeck in jail in or about July 2007 because he was having problems with the motor he had bought from Gersbeck. Respondent heard Gersbeck was "locked up" so he went to visit him and talk about it.

It was stipulated that the NCPD recovered a Department radio from Respondent's garage. Respondent testified that, prior to January 23, 2009, the last time he was on full duty status was in October 2008. That month, he and his partner were involved in a motor vehicle accident while on duty. They were taken to the hospital, where Respondent was diagnosed with two herniated discs. Respondent was then taken home, and all of his property that was in the damaged radio motor patrol car (RMP) was dropped off at his mother's residence. Respondent's mother then placed his property in the garage.

Respondent denied that he gave Gersbeck money or a weapon to kill Person A or asked him to kill Person A. He testified that the money he gave Gersbeck in March 2008 (on cross examination he said it was in 2007) was for a motor that Respondent purchased from Gersbeck. Respondent paid Gersbeck \$2,000 for the motor, although he had asked for \$3,000. Thus, he still owed \$1,000.

On cross examination, Respondent testified that he informed the desk officer about his broken shield. For two weeks, until he had it repaired (and bought a duplicate), Respondent was assigned as the telephone switchboard operator.

DX 28 a-c were photographs of Respondent's tool box and what appeared to be a Department radio. Respondent claimed that the radio was in the bag that was dropped off at his mother's residence and that law enforcement searching the garage placed the Department radio in plain view. Had he seen it earlier, he would have contacted the appropriate command.

Respondent said that when he visited Gersbeck in jail, the visit lasted for one-and-a-half to two hours. They talked about racing and their respective children. He denied paying Gersbeck anything other than the \$2,000, even though Gersbeck did further work on his car. Respondent would do little things for Gersbeck, like get him dinner or give him gas money. He also gave him \$300 for Christmas gifts and a free tree from the fire department, which had been holding a tree sale. Gersbeck never threatened to rob Respondent or Person A if Respondent did not give him money.

Respondent testified that when Gersbeck was arrested in 2007, he went with Gersbeck's father to the courthouse to pick up Gersbeck's truck.

Respondent testified that the divorce was amicable at times, and not at others. He denied that he and Person A argued over money but agreed that "on occasion" they argued over custody

and visitation issues. He sought custody of Minor B because the boy wanted to live with him. The trial over Minor B's custody was to begin in February 2009.

Respondent acknowledged that in the months preceding January 23, 2009, there were approximately 109 telephone calls between him and Gersbeck. He said that those conversations involved discussions about racing and their cars. He was sure he mentioned Person A but could not recall specifically.

On January 23, 2009, Respondent testified, he was taking the children upstate to spend the weekend with his fiancée and her son. There were two calls in which Gersbeck and Respondent spoke to each other, at 1430 hours and then at 1518. Gersbeck wanted to know what Respondent was doing that weekend. Although it was not racing season, they did work on their cars. Respondent conceded that he and Gersbeck did not "hangout and play pool," go drinking, to the movies, or to sporting events.

Respondent stated that he picked up Minor B and Minor C from school and not from Person A's residence. He did not know whether Person A was home or not.

Respondent testified that he would sometimes physically give Gersbeck gas money or leave it by the car. Respondent denied giving Gersbeck gas money on January 23, 2009. On January 22, 2009, however, Gersbeck needed gas money so he went to the home of Respondent's mother. After learning that Respondent was not home, Gersbeck called Respondent and asked him for gas money. Respondent did not have it at the time, so he said that he would leave some money for him the next day and place it behind the race car, under the rocks. DX 29 was a photograph depicting \$20 under a gray stone. Respondent stated that he did not leave the gas money with his mother because she went out during the day. Respondent conceded, however,

that he said during his official Department interview that he did not leave it with her because he did not want her to get involved in his business.

Respondent maintained that he did not tell Gersbeck where Person A worked, nor did he tell Gersbeck where she went to the gym or the type of vehicle she drove. Respondent recalled that Gersbeck saw Person A once before Respondent's divorce and that Person A also might have waved at Gersbeck.

Respondent testified that he rarely carried his firearm with him while off duty.

Respondent admitted that he still owed Gersbeck approximately the balance on the motor, plus \$2,000 for additional work Gersbeck performed on his car. Respondent explained that in 2008, Gersbeck "redid the whole entire body of my car, he took the whole entire body off and put it back on." Because this was a harder job than the work he had done for free, Gersbeck asked to be compensated.

Respondent testified that he was arrested at the Fleet Services Division in Brooklyn. Members of the New York City Police Department's (NYPD) Internal Affairs Bureau (IAB) and the NCPD were present. He was well aware of the investigation into his role in the attack on Person A. He knew he was going to be arrested, not necessarily that day, and was relieved, neither emotional nor upset. He felt overwhelmed that this was happening to him. He was transported back to Nassau in an NCPD vehicle. Nassau Detectives Jason Gaertner and Robert Galgano were in the front and Respondent was in the back. The radio was on. Respondent looked out the back of the car and saw two NYPD vehicles following with lights flashing. He denied slumping his head and saying, "I threw my life away, I threw away 17 and a half years." What he said was, in reference to the vehicles from the NYPD, "I can't believe this is the way they treat me after 17 and a half years with the police department."

On re-direct examination, Respondent indicated that he was assuming that all the property was removed from the RMP after his accident and given to him.

Respondent testified that Synergy provided free memberships to all FSMFD members and their families. Respondent also said that Gersbeck played on the fire department's softball team.

Stipulations

The following stipulations were agreed to by both parties:

Deputy Sheriff Sandra Phillips of the Nassau County Correctional Facility would have testified that there was only one documented visit by Respondent to Gersbeck at the jail, in July 2007.

It was stipulated that Respondent was not in arrears on child support per se. There were ancillary issues as to medical and day care that Person A believed Respondent owed. It was his position that such expenses required prior court approval. The matter was still the subject of litigation. His salary was being garnished to pay support.

There were three phone calls between Respondent and Gersbeck on January 23, 2009. Respondent called Gersbeck at 1430 hours but the call was dropped. Gersbeck called back at 1433. The third call was from Respondent to Gersbeck at 1518.

It was stipulated that Gersbeck owned, possessed and was carrying a tool grinder on January 23, 2009. He also had tool grinders in his shop. Moreover, had Gaertner and Galgano testified, they would have said that Gersbeck's screwdriver was never tested against his vise grips or grinders. Had Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) Agent Gregory Klees testified, he would have said that Gersbeck's screwdriver and vise grips were

tested against Respondent's grinders and that they found no link between the tools. Klees testified at the criminal trial that the tools submitted to him for examination did not cause the marks on the base of the screwdriver's handle.

Had Gaertner, the NCPD detective that transported Respondent, testified, he would have stated that he heard Respondent say, "I threw away my life, I threw away 17 and a half years." Gaertner memorialized this statement. Galgano, Gaertner's partner, would have testified that he was in the car but did not see Gaertner writing anything down (see DX 26, tr. of Gaertner's criminal trial testimony; DX 27, tr. of Galgano's criminal trial testimony). Furthermore, Gaertner would have testified that he was the lead detective in the investigation. He did not obtain or investigate the video that Respondent supposedly showed Gersbeck of Gersbeck's family.

FINDINGS AND ANALYSIS

Specification Nos. 2-5

Introduction

Respondent is charged, in essence, with plotting to kill his former wife, Person A, and hiring Timothy Gersbeck to do the killing. The basic facts are as follows: Gersbeck and Respondent were friends. Gersbeck testified that Respondent offered him the sum of \$5,000 to kill Person A. On the evening of January 23, 2009, at approximately 1730 or 1800 hours, Gersbeck attacked Person A at her home in [REDACTED]. He had a sharpened screwdriver. He came up to her as she was at her front door and grabbed her. Gersbeck did not use the instrument with any great force, and with Person A already having unlocked the door, she fell through the doorway and to the ground. Person As boyfriend and son were there; Gersbeck

ran and they chased him. Gersbeck was caught, and alleged that Respondent had put him up to it. Respondent denied having anything to do with the incident.

Many separate factual threads in this case came into focus at this trial. The Court will marshal these as follows.

Attempted Robbery, or Attempted Murder?

Gersbeck and Person A did not know each other to any degree other possibly than in passing. There is no sign that he would have known her address unless Respondent told it to him, and there was no apparent reason Respondent would have had for doing so. The Department's argument was that Gersbeck's only possible intention could have been murder, and the only motive was that of Respondent.

Respondent argued that the evidence pointed not to an attempted murder at all, but to an attempted robbery. Person A testified that Gersbeck came up behind her, put his hand over her mouth and a sharp object to the back of her neck, and said, in sum and substance, "Shut up or I'll kill your son and daughter." She felt herself bleeding, and said that it was the pointed instrument that actually propelled her through the doorway. The medical evidence showed that Person A suffered a small wound to the back of her neck. It was described as superficial, meaning that it did not pass into the subcutaneous fat layer. Nevertheless, as the emergency room physician pointed out, had the screwdriver gone further into the victim's neck, in a variety of angles, it could have killed her in a variety of ways.

Respondent argued that this showed a lack of intent on Gersbeck's part to commit murder. If he had wanted to kill Person A, he could have done so easily. The fact that Gersbeck

had her in his hands, with the screwdriver to her neck, and only wanted her to remain quiet, pointed to a robbery attempt.

Respondent's argument, however, discounts several possibilities. Gersbeck might have been trying to make an intentional murder look like a robbery gone bad. He might have gotten cold feet at the last second. The medical evidence demonstrated that he did not merely place the screwdriver to Person A's neck. It went in superficially, but enough to form a wound with a diameter of about 0.5 cm – about the diameter of the screwdriver shown in court (DX 13). Although Gersbeck self-servingly described this as, "I realized what I was did was wrong," it might have come down to him not being able, physically or emotionally, to shove a pointed metal shaft through another person's neck or skull. It is also possible that he panicked once he saw Dashner, Person A's boyfriend, and Perez, her adult son from a different relationship, in the living room. Finally, it was only Person A that testified that Gersbeck said anything; Gersbeck testified that he said nothing. Both were Department witnesses. Under Gersbeck's account, which the Department put forth, there is little evidence that he was trying to rob her; he tried to stab her and missed.

Respondent also contended that Gersbeck was desperate for money and thus would have had a motive to rob Person A. But a desire for money also could have driven him to agree to kill Person A for the sum of \$5,000. There is also the issue of why Gersbeck would have chosen Person A to rob as opposed to anyone else. She testified that she was a civil service employee, and there was no evidence suggesting that cash or other valuables existed in great degree at her house or on her person. Respondent's assertion that it was a Friday, so Person A would have just gotten paid, is speculative. Not everyone gets paid on Fridays, much less every Friday. There

was no evidence that she would have gotten paid in cash, or even a check (as opposed to direct deposit), or had cash on her person at the end of the day.

Finally, if this was a robbery, it begs the question of why Gersbeck contemporaneously said it was an attempted murder, done at Respondent's behest. While it was disputed whether Gersbeck told Dashner or Perez that Respondent had sent him, Gersbeck did say this, on the night of the attack, to law enforcement, first to Nassau County detectives and then to an assistant district attorney. As the Advocate argued, he could have exclaimed to them that they had it all wrong and that he was only trying to rob Person A. The Court notes that on the video, there was a palpable sense of relief in Gersbeck's demeanor, a marked difference from his hardened exterior at trial. Gersbeck did not appear upset that he was being accused of attempted murder when he, according to Respondent's counsel, really had only tried to rob Person A. On the other hand, it is possible that Gersbeck thought he would receive less prison time by confessing to attempted murder and implicating Respondent than he would by stating that he committed an attempted robbery on his own. Still, from the video, it seems unlikely that he would have been able to formulate so many false details so quickly.

In sum, the Court finds that the evidence of the attack does not support Respondent's claim that Gersbeck was only trying to rob Person A. The facts that Gersbeck was desperate for money, would not have known where Person A lived unless Respondent told him, and contemporaneously gave a detailed statement that he was trying to kill Person A at Respondent's behest, support the Department's argument that this was an attempted murder.

Motive

The Department alleged that Respondent's motive for wanting Person A dead was that he wanted custody of their minor child, Minor B. Gersbeck testified that Respondent was hostile and had a negative attitude toward Person A concerning the various disputes that had arisen after their divorce. There was a continuing dispute over money that Person A alleged was owed by Respondent.

The Court discounts Respondent's supposed desire for custody of Minor B as a motive for murder. The Department's position was also that Respondent did *not* want custody of their daughter, Minor C. If Person A was dead, that would leave Respondent as the custodial parent of both minor children. Furthermore, Respondent's counsel stated that Minor B's law guardian recommended that Respondent receive custody, so he would have less of a motive to eliminate a rival.

Nevertheless, the objective facts show that Respondent's salary was still being garnished in 2009 for his obligations toward Person A and their children, and that litigation was continuing three years after the divorce. Contested motions for change in custody, which involve a forensic evaluation of the parents and children, requiring an interview by a mental health professional, are not generally without acrimony. This hostility, borne of the litigation, would have provided ample motive. This is especially relevant in light of the fact that the next date in the custody case was scheduled for February 2009.

Commission and Planning of the Attack

Part of Respondent's argument that Gersbeck acted alone was that if the attack was an attempted murder ordered by Respondent, it was planned and carried out in a seemingly

inscrutable way. Killing Person A by stabbing her in the back of the neck risked an enormously bloody scene.

Furthermore, there was no apparent reason to kill Person A at her home. It pointed scrutiny directly at Respondent because it suggested that she was targeted specifically. Gersbeck said that Respondent told him that she attended a local gym (Respondent denied this, but asserted that Gersbeck would have known she went there because he was aware that all FSMFD members Person A was a volunteer received free membership there). Gersbeck also testified that Respondent told him where she worked and routes she took to get there. Gersbeck could have attacked Person A at one of these places, late in the evening, and it would have looked like a random robbery gone bad. On the other hand, Gersbeck asserted in the statement to Acquafredda that after a while, Respondent just wanted the job done.

There is also the issue of how Gersbeck knew whom to kill. He allegedly was being paid and threatened to do this, so he had a motivation to do it correctly. Yet Gersbeck stated that while Respondent pointed out her vehicle, and told Gersbeck where she lived, he never provided a photograph of Person A. Gersbeck testified that he tried to commit the murder on prior occasions. On one of these, he followed Person A's car. The car arrived at the scene of a fire department response and a woman exited. Gersbeck concluded that it was Person A, but as Respondent's counsel argued, it could have been her sister, someone borrowing the car, or any other number of people.

The Court notes that the attack on Person A certainly was not carried out with the kind of planning and skill one might expect. That does not mean that Gersbeck was not planning to kill her, however. If he was trying to rob her, as Respondent claims, he was just as sloppy. This was

an amateurish act, carried out by an amateur. In sum, the amateurishness of the planning and execution of the crime does not establish the intent was either robbery or murder.

Jail Visit

Gersbeck testified that Respondent visited him in the Nassau County jail in July 2007 and asked him to kill his wife. Respondent admitted visiting him in jail, but denied discussing any such thing.

The jail visit is significant for the Department's case. Respondent testified that he and Gersbeck were not close friends and mainly socialized concerning their shared racing hobby. Nevertheless, Respondent asserted that there were problems with the car Gersbeck had worked on, and he found out he was in jail, so he went to visit him. The parties stipulated that there was a single visit. Respondent testified that it lasted between one-and-a-half to two hours. During this time, they talked about racing and their children.

As a police officer, Respondent knew that by visiting Gersbeck, he was associating with someone that had a criminal record (see Patrol Guide § 203-10, p. 1, ¶ 2 [c]). He also did not notify the Department in writing that he was visiting an incarcerated individual, as required, see Patrol Guide Series 205, Interim Order 11-04.

All of this suggests that it was vitally important to Respondent that he communicate with Gersbeck in July 2007. It was also essential to him that he make the visit in person; Respondent provided no reason why he and Gersbeck could not talk about the car in letters or over the phone. To the Court, it means that Respondent wanted to talk to Gersbeck in a way that would not necessarily be recorded or memorialized. There was no testimony as to where they spoke, or whether the conversation was monitored.

The idea that Respondent risked his career to speak to a casual friend about auto racing matters is incredible. The Court is left with no other conclusion than that Respondent went to the jail to speak to Gersbeck about murdering Person A.

Consideration and Gas Money

Gersbeck asserted that Respondent offered him \$5,000 to kill Person A. There was to be \$2,500 up front and \$2,500 after the murder was carried out. There was also a \$300 advance around Christmas 2008. Respondent admitted that he gave or owed Gersbeck money, but that it was all related to work Gersbeck did on Respondent's automobiles. Respondent paid Gersbeck \$2,000 for his work on a motor, although Gersbeck had asked for \$3,000, leaving a \$1,000 balance. Respondent also owed Gersbeck an additional \$2,000 for a complete workup on one of the vehicles, including the rebuilding of the chassis. Respondent also said that he gave Gersbeck \$300, but as a gift for Christmas one year.

Gersbeck admitted that the first \$2,500 was paid in March 2008. On the one hand, this was nine months before his attack on Person A. Respondent also pointed out that he did make a March 2008 payment, but this was right at the beginning of the racing season. Gersbeck, however, testified that he did not originally want to carry out the attack and it took him a while to actually do so.

The Court finds Respondent's claim that he, an individual under financial strain as a result of continuing matrimonial and family litigation, gave a \$300 Christmas gift to a not-very close friend, to be absolutely incredible.

Respondent's counsel argued that the jailhouse letter from Gersbeck to his girlfriend (DX 22), Person D, was proof that the money exchanged between Respondent and

Gersbeck involved legitimate transactions related to racing. Gersbeck wrote, "I sold him one of my race motors and he still owes me \$5200⁰⁰ bucks. So now that I[']m working with the system they said that money is money for hire the way it went down but he actually owes me more th[a]n that and I[']m still out of the money and the motor." Counsel contended that this was a proverbial smoking gun, that it showed that the money exchanged was for the cars, and it was only the Nassau authorities that pushed Gersbeck to say it was money for hire. At the Department trial, Gersbeck asserted that he only wrote that to Person D because he did not want her to think he was capable of killing someone for money.

The letter is damaging to the Department's case. Gersbeck's explanation is dubious, as it still would have left Person D thinking that he was capable of attacking a woman with a sharpened screwdriver, just not for money.

Nevertheless, the letter can be read a different way. Respondent indicated that the total sum of what he owed Gersbeck was \$3,000 for the motor and body work. Gersbeck claimed that Respondent also owed the balance of \$2,200 for the murder: the second \$2,500 installment minus the \$300 Christmastime payment. \$3,000 plus \$2,200 is \$5,200. Gersbeck had no reason to cite this figure if he was not also owed \$2,200 for the murder.

The manner in which money was exchanged between Respondent and Gersbeck is also significant. It was undisputed that Respondent left Gersbeck gas money on the night of the attack, although Respondent maintained that this was merely a gift. He admitted that he gave the money to Gersbeck not by handing it to him because he did not have the \$20 on him at the time. Instead, the next day, Respondent left him the money at the back of his driveway, under some paving stones.

Respondent admitted that in his official Department interview, he told investigators that he did not leave the money with his mother because he “did not want to get her involved in my business.” The Department argued that Respondent did not want his mother to be a witness to the events. The Court agrees, and notes that Respondent’s behavior suggests that he did not want to have his mother know what was going on. It also suggests that Respondent did not want anyone to witness an exchange of cash between him and Gersbeck on the night the latter was sent to kill Person A. In sum, there is no credible reason for Respondent to have left money hidden under a paving stone at back of his driveway.

Looked at as a whole, the exchange of money supports the Department’s assertion that it was for the purposes of Gersbeck killing Person A.

Threats against Gersbeck’s Family

Respondent’s counsel pointed to several statements by Gersbeck during the police investigation through the criminal trial and this hearing that were allegedly inconsistent.

At trial, Gersbeck claimed that Respondent goaded him into attempting to kill Person A by threatening Gersbeck’s family. Gersbeck stated that Respondent showed him a video of Gersbeck’s family, intimating that he had the ability to find them again and harm them. He also displayed a gun to Respondent. Gersbeck, however, did not mention any of this in his written statement to Nassau detectives or the video statement to the ADA. He only mentioned traffic tickets that Respondent had fixed for him, and which Respondent claimed he could make “come back” if Gersbeck did not cooperate.

Counsel pointed out that if Gersbeck had a defense of duress, there was no reason why he should not have mentioned it previously. Gersbeck did, though, mention the threats in the letter

to Person D, received by her on February 24, 2009. Gersbeck was visibly nervous during the video statement to Acquafradda, noting that he was “flustered,” apologizing for “mixing everything up now,” and stating that he knew he was leaving things out of the narrative. The ADA did not

interrogate Gersbeck to any great degree. The interview took about 22 minutes.

No video of Gersbeck’s family was looked for by the NCPD and none was introduced into evidence. It is doubtful that someone would agree to kill over traffic summonses, and Gersbeck indicated at trial and on the video that he was not sure whether it was possible that Respondent could make the matter re-appear. He did state that warrants were possibly involved in connection with the tickets, raising the possibility that Gersbeck believed Respondent had the ability to have him arrested on those warrants. Nevertheless, whether the threats were made is not determinative of the case. It might simply have been an embellishment by Gersbeck to make himself seem less blameworthy.

The Screwdriver and the Gloves

Gersbeck testified that Respondent supplied him with the sharpened screwdriver. The parties stipulated to testimony that was given by an ATF agent at the criminal trial. The agent testified that he tested the screwdriver and Gersbeck’s vise grips against Respondent’s tool grinders. The idea was that marks on the screwdriver possessed by Gersbeck could be matched to marks made by machinery possessed by Respondent. The ATF agent testified that the marks on the screwdriver did not match the machinery from Respondent’s shop. Respondent’s counsel pointed out that the Nassau authorities never had the ATF check on machinery at Gersbeck’s disposal.

Gersbeck stated that Respondent gave him the screwdriver, wrapped in a white latex glove, as seen in DX 13. He was wearing blue latex gloves at the time of the attack. DX 12 was a photograph of these gloves after Gersbeck took them off and dropped them in someone's yard. He testified that Respondent supplied him with the white gloves for the attack, placing the screwdriver in one of them.

Respondent's counsel contended that Gersbeck had claimed in his video statement to Acquafridda that he essentially wore the blue gloves the entire day. The ADA asked Gersbeck about the blue gloves, saying, "You wore them as you, uh . ." Gersbeck answered, "Yeah. Uh, honestly, I, I know it doesn't sound real, but I wear them all day, and for work stuff, everything, 'cause I deal with chemicals a lot and I'm just so used to 'em, but I put them on prior to going there." The context of Gersbeck's statement demonstrates that he did not mean literally that he wore the gloves 24 hours a day. Rather, he had put them on before getting to Person A's house.

The Court notes that it does not make sense that Gersbeck would have chosen two different types of gloves to commit this single crime. The two different gloves support Gersbeck's assertion that he was supplied with the white ones by Respondent.

Phone Calls

Three phone calls were made between Respondent and Gersbeck on the day of the attack. Respondent asserted that he and Gersbeck spoke on occasion because they shared a hobby racing cars. Respondent said that Gersbeck called him that day looking for work, and wanted to know what he was doing that weekend. This does not explain why it was Respondent that called Gersbeck first that day. The call was dropped, and Gersbeck called back. Respondent then called Gersbeck one more time.

The sequence of the calls suggests that Respondent was trying to get in touch with Gersbeck on the day of the attack. It supports the Department's assertion that Respondent needed to get in touch with Gersbeck to plan the attack.

Respondent's Statement While Being Transported

The parties stipulated that one of the NCPD detectives, Gaertner, would have testified that after Respondent was arrested at work, and during the transport to Nassau County, he made an inculpatory statement. He was driven in an NCPD vehicle, followed by vehicles driven by members of the NYPD IAB. He was in the back seat and kept looking behind him, out the back window. He allegedly said, in sum and substance, "I threw my life away, I threw away 17 and a half years," referring to his presumably-finished career with the Department. Gaertner would have testified that he wrote down a note memorializing this statement. The other NCPD detective, Galgano, did not see Gaertner writing anything. At the Departmental hearing, Respondent testified that he actually said, referring to the IAB personnel, "I can't believe this is the way they treat me after 17 and a half years with the police department."

The Court fails to understand why Respondent would have been surprised. He admitted that he already knew he was under investigation for conspiring and attempting to kill his wife. In fact, he admitted that the arrest did not surprise him. Thus, it should not have been surprising to him that, upon being arrested for attempted murder, he would have been taken by detectives to court, followed by members of this Department's Internal Affairs Bureau. On the other hand, he might have been expressing unhappiness at the fact that the authorities were so quickly taking the word of Gersbeck and Person A.

The event is open to interpretation, as each statement can be seen as consistent with each party's view of the case as a whole. Thus, the matter does not add much to the case.

Conclusion

Several parts of this case stand out as most important to the Court. (A) There is no good explanation for why Gersbeck appeared at Person A's door other than if he had been sent there by Respondent to kill her. Absent Respondent's action, there was no reason Gersbeck would have chosen to rob Person A as opposed to any other individual. (B) There was animosity between Respondent and Person A due to the continuing litigation over the children. This constituted sufficient motive for murder. The next date in the case was in February 2009. (C) Respondent described his relationship with Gersbeck as friendship, but not close friendship. They mainly were friends because they had a hobby in common. Yet Respondent, knowing as a police officer that it was a violation of the Patrol Guide to associate with someone that had a criminal record, and to visit him in jail without notification, visited him anyway. There was no reason to do an in-person visit other than if Respondent wanted the least possibility of a record of their conversation. (D) Respondent gave \$300 to Gersbeck a month before the attack. The Department said this was payment for the murder; Respondent said it was a Christmas gift. That is a large amount to give even a close friend, especially for someone like Respondent, who had monetary pressures. Similarly, Respondent said that he left \$20 in the corner of his driveway as gas money for Gersbeck on the night of the attack. There was no reason to leave it there, as opposed to handing it to him or having someone else give it to him, unless Respondent did not want to be seen handing money to Gersbeck on the night Person A was attacked. (E) Respondent contacted Gersbeck on the day of the attack, not the other way around. The nature of these

contacts by Respondent is not explained by his claim that Gersbeck wanted to know if they would be spending time on their cars that weekend.

There are inconsistencies in this case, to be sure. Gersbeck might have embellished his account in an attempt to make himself look better or Respondent worse. He might have taken actions that strike experienced criminal practitioners as confusing. The Court concludes that the Department proved that it is more likely than not that Gersbeck attacked Person A in an attempt to murder her, and that he had no reason to do so other than at Respondent's bequest.

Accordingly, the Court finds Respondent Guilty of Specification No. 2, Attempted Murder in the First Degree, for attempting to kill Person A by paying Gersbeck in exchange for carrying out the murder. The Court also finds Respondent Guilty of Specification No. 4, Assault in the Second Degree, acting in concert with Gersbeck to cause physical injury to Person A by means of the screwdriver, a dangerous instrument. It is not questioned that Gersbeck intended to cause substantial pain to Person A, and she testified that she suffered “[h]eadache, pain in my neck radiating to the top of my head.” Finally, the Court finds Respondent Guilty of Specification No. 5, Criminal Possession of a Weapon in the Fourth Degree, acting in concert to possess the screwdriver with intent to use it unlawfully against Person A.

The Court finds Respondent Not Guilty of Specification No. 3, Conspiracy in the Second Degree, as the Department failed to prove by a preponderance of the evidence that the weapon was supplied by Respondent, as alleged in the specification. As noted, it was stipulated that ATF testing revealed that the screwdriver did not come from Respondent's tool shop. No testing was done on equipment to which Gersbeck had access.

Specification Nos. 1 & 6

Having pleaded Guilty to Specification Nos. 1 and 6, Respondent is found Guilty.

Specification No. 7

The seventh specification charges that Respondent was “wrongfully in possession of a Department radio previously reported missing from the 103rd Precinct in 2006.” A radio was found in Respondent’s home when it was searched during the criminal investigation. In his garage, on top of his tool cabinet, was the radio. The cabinet and radio can be seen in DX 28a-c. Respondent admitted that the radio was in his home, but he said that it had actually been located in a duffel bag. This bag was brought to his house after he had been injured in a line-of-duty vehicular accident in the fall of 2008. Another member of the service put his belongings from the police vehicle into the duffel bag, then brought the bag to Respondent’s house. He never saw it or never opened it until it was found pursuant to the search. Respondent posited that the radio was in the vehicle at the time and got mixed in with his own things.

Respondent did not provide credible testimony in this regard. He did not explain why he would have had personal belongings in his police vehicle, or why he failed to open a bag of his own belongings for several months. But most glaring is the fact that the radio was reported missing from the 103 Precinct, where Respondent had previously been assigned, in 2006, two years before the accident. Thus, his testimony did nothing to explain the existence of the radio at his home because it did not explain why the radio was in the car in the first place. The Court concludes that Respondent was wrongfully in possession of the radio and finds him Guilty of Specification No. 7.

PENALTY

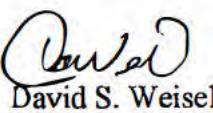
In order to determine an appropriate penalty, Respondent's service record was examined.

See Matter of Pell v. Board of Education, 34 N.Y.2d 222 (1974). Respondent was appointed to the Department on July 13, 1992. Information from his personnel file that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

Respondent has been found Guilty of attempted murder in that he hired another individual, Timothy Gersbeck, to kill Respondent's ex-wife, Person A. Person A survived the attack. Respondent has also been found Guilty of visiting Gersbeck in jail prior to the attack. When Respondent's home was searched pursuant to the criminal investigation, a duplicate shield and missing Department radio were found.

Under the circumstances, the Court recommends that Respondent be DISMISSED from employment with the Department. See Case No. 84782/08, July 17, 2011 (termination for traffic enforcement agent who tried to kill his wife, stabbing her in the stomach, neck and back).

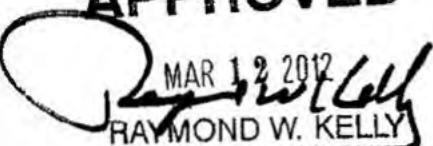
Respectfully submitted,



David S. Weisel

Assistant Deputy Commissioner – Trials

APPROVED



MAR 12 2012

RAYMOND W. KELLY
POLICE COMMISSIONER

POLICE DEPARTMENT
CITY OF NEW YORK

From: Assistant Deputy Commissioner Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER ANTHONY BATTISTI
TAX REGISTRY NO. 900179
DISCIPLINARY CASE NO. 2009-0405

In his last three annual evaluations on record, Respondent received overall ratings of 4 “Highly Competent,” 3.5 “Competent/Highly Competent” and 3.5 “Competent/ Highly Competent.” He has been awarded two medals for Excellent Police Duty and 3 Commendations.

[REDACTED] Respondent was placed on Level 2 Discipline Monitoring from August 30, 2007, to January 2, 2012, for “Serious Misconduct.” He has 82 career arrests.

In 2004, Respondent forfeited 10 vacation days after pleading guilty to being absent without leave. In 2007, he forfeited 20 vacation days after he was found guilty at a Department trial for criminal association.

For your consideration.



David S. Weisel
Assistant Deputy Commissioner – Trials